No. 2725

United States
Circuit Court of Appeals
For the Ninth Circuit

TWIN FALLS SALMON RIVER LAND AND WATER COMPANY, a Corporation, SALMON RIVER CANAL COMPANY, LIMITED, a Corporation, COMMONWEALTH TRUST COMPANY OF PITTSBURGH, Trustee, and A. C. ROBINSON, *Appellants*,

vs.

A. E. CALDWELL, W. F. MIKESELL, V. E. MORGAN, J. E. POHLMAN, W. C. POND, JAMES W. BEAUCHAMP, CARL WASHBURN, and HAROLD M. SIMS, in their own behalf and in behalf of all persons similarly situated with them, *Appellees.*

PETITION OF APPELLANTS FOR REHEARING OR MODIFICATION OF DECISION

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

S. H. HAYS,
RICHARDS & HAGA, and
McKEEN F. MORROW,
Solicitors for Appellants.
Residence: Boise, Idaho.

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PETITION OF APPELLANTS FOR REHEARING OR MODIFICATION OF DECISION

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

To the Honorable The United States Circuit Court of Appeals, for the Ninth Circuit:

Your Petitioners, Twin Falls Salmon River Land & Water Company, Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, appel-

lants in the above entitled cause, respectfully petition this Honorable Court, as follows:

1. To amplify the decision herein so as to render clear beyond possibility of misconstruction the nature of the interest which this Court holds that a purchaser of water rights acquired in the irrigation system, and whether the construction company is a guarantor of the sufficiency of the water supply and is liable in damages if it fails to deliver (the supply being insufficient) the amount of water required, the purchaser having received his full proportionate share of the available supply, but the same being insufficient to produce a maximum yield. And in the event this Court meant to hold that the construction company is under an unlimited obligation to deliver what the settler requires, regardless of the insufficiency of the available supply, then your Petitioners pray that a re-hearing may be granted them in this cause, to the end that they may be permitted to more fully express their views on the subject and show why such decision is contrary to and in conflict with the decisions of the Supreme Court and statutes of the State of Idaho.

2. That the statements in the opinion to the effect that the irrigation system constructed by the appellant Twin Falls Salmon River Land & Water Company has not the required capacity, but that "the capacity of the system being, as has been said, only about one-third of what it was then thought it would be," and other statements of a similar nature, and statements to the effect "that the construction

company has already sold water rights far beyond the available supply of water," be stricken from the opinion as they are unsupported by the record, were not in issue, and are prejudicial to the rights of these appellants, and may be accepted in the future by courts and other tribunals and public officials as *res judicata* and conclusively binding on these appellants, when the record, as a matter of fact, shows that the irrigation system has a capacity far in excess of its requirements and the trial court declined to permit appellants to introduce evidence as to the sufficiency of the water supply, on the erroneous assumption that the construction company must deliver 2¾ acre feet per acre, even though the settler does not need it.

3. That the statements in the opinion to the effect that the Federal law does not require the Secretary of the Interior *to determine the sufficiency of the water supply before the segregation is made and before the works are constructed and the lands thrown open for entry*, but may defer his decision until *after* the works have been built and the lands have been settled upon and improved by actual settlers, and may in fact change his decision as to the sufficiency of the water supply *after the works have been so constructed, and the lands settled upon and occupied by actual settlers*, be either stricken from the opinion as not necesssary to a decision of the case and as having no bearing upon the conclusions reached by this Court on the other questions upon which the decree of the trial court was reversed, or that a

rehearing be ordered upon this question and appellants given full oportunity to show why the decision of this Court on that question is contrary to law and will cause irreparable injury to both appellants and appellees if the same be permitted to remain in the opinion in its present form.

4. That in the event this Court concludes that the Federal law does not require the Secretary of the Interior to determine the sufficiency of the water supply before the segregation is made, but may defer his decision until after the works have been built and the lands have been settled upon and improved by settlers, then the Court should further hold that the construction company could not legally sell water rights in the system beyond the point where the undivided interest acquired by the individual settlers would entitle them to sufficient water to meet the requirements of the Secretary of the Interior when application is made for patent, and that all contracts entered into after that limit was reached are null and void and unauthorized alike by State and Federal laws; for any other construction would lead to the disastrous situation that a settler who had purchased water rights before such limit had been reached would without his knowledge, acquiescence or consent be deprived of his property—of all possibility of obtaining title to his land, by the Company selling water rights in excess of the limit or to an extent that would leave each settler less than an "ample supply," as required by the Federal law as a condition precedent to the

issuance of patent. For if the Secretary is not required to issue patent based upon his decision at the time the segregation was made, that the water supply was sufficient, then we submit the correct construction of both the State and Federal laws on the subject must be that undivided and proportionate interests in the irrigation system and water rights may be sold to the limit of the available supply, or to a point where such undivided interest will entitle the owner to a water supply sufficient to obtain title to his land under the Federal statues; but sales beyond the actual supply must be held absolutely null and void and cannot be construed to operate as a diminution or reduction of the rights that had previously been sold. Each purchaser in his order, until the available supply was exhausted, must be held to have purchased and acquired a supply sufficient to entitle him to patent. Less than that would defeat his title to the land and the lien of the construction company, and neither the State nor the parties to the contract can be held to have intended such a result.

5. Appellants are entitled to recover their costs on appeal.

ARGUMENT

In view of the many parties and the large interests concerned in this controversy, and the time and expense required to bring about a complete determination of all questions involved between so many conflicting interests, it is of the highest importance that the decision of this Court should finally determine

all the questions that can be raised on the record, and that the decision of the Court be not subject to misconstruction, for in that event the re-trial of the case may be entirely fruitless, and this all parties clearly desire to avoid.

The various interests affected have already placed different constructions on the decision rendered in this case. Whether the decision is susceptible of more than one construction it is unnecessary to discuss. It is sufficient that parties interested and the trial court may differ as to its construction, and such differences will undoubtedly lead to further appeals and to unnecessary expenditures of time and money and to great delay in the final determination of the case.

We shall first consider what is said in the opinion with reference to the nature of the water rights acquired by the settlers, and if our construction of the decision is correct we are in entire accord with the views expressed by the Court; but if we have misconstrued the decision, then we would respectfully pray that a rehearing be granted.

I.

The Construction Company discharges its duty when it apportions between the Water Users the Available Supply at the rate of 1-100 *of a cubic foot per second in periods or by rotation as the crops of the Settler may require, and it is not a guarantor of the Water Supply and is not liable in damages if the available supply is insufficient.*

As we construe the decision in this case, the above statement tersely expresses the decision of the Court on this proposition, and we are in entire accord with the views of the Court, for we think the laws of the State and the contracts before the Court are not susceptible of any other construction. It appears, however, that different interpretations are being placed upon the Court's decision on this question. The Court says (p. 29):

> "It therefore appears by the express declarations of the contract between the parties that the specific amount of water sold to the respective settlers is not a constant flow of that amount, but to be delivered and received in rotation; and such, as we understand, is the almost if not quite universal custom under similar systems of irrigation works. It may be that such amount so used may prove insufficient for the proper irrigation of these lands, but it is most obvious that the interest of all the parties concerned demand the utmost care in the distribution and use of the water, to the end that the best results possible may be obtained. When the well-known fact is remembered that desert lands after cultivation can produce profitable crops with less water than when new, and that a very considerable quantity of the lands embraced within the present project have, according to the record, been abandoned, with the possibility that more may be, it is at least to be hoped that of the remainder a success may be made for all concerned."

This statement is construed by appellees as meaning that they are entitled to receive 1-100 of a cubic foot per second throughout the entire irrigation season if their crops require this amount, and this would amount to 4.16 acre feet per acre (record, p. 19), instead of 2¾ acre feet per acre, which was allowed them by the trial court and which was really all that the appellees contended for.

We should add that appellees further construe the opinion to mean that the construction company obligated itself to deliver 4.16 acre feet per acre per annum at the rate of 1-100 of a cubic foot per second, in the event the crops require that amount, and that it is liable in damages if it fails to deliver that amount, although its failure to make delivery may be due entirely to the insufficiency of the supply. In other words, the decision is construed by some as meaning that the construction company must not only deliver to each settler his proportionate part of all that is available in the event the crops require it, but it must respond in damages if the proportionate part so delivered is insufficient for the needs of the crops and is less than 4.16 acre feet per annum. It will be observed that this construction of the opinion renders the decision of this Court far more favorable to appellees than was the decision of the trial court from which appellants appealed and from which appellees *did not appeal.*

Your Petitioners, however, as stated above, construe the statement quoted and other statements in the opinion with reference to this matter as meaning that the irrigation company must deliver the

water available to the settlers at the rate of 1-100 of a cubic foot per second at such times and in such periods of rotation as the condition of the crops may require, but that its liability in this matter ceases when all the water available has been properly distributed, even though the amount distributed is less than 4.16 acre feet per acre and less than what may be required to produce a maximum yield; and we think that is a fair construction of the Court's opinion.

Should the trial court accept the construction placed on the opinion by appellees, appellants would be compelled at great sacrifice of time and money and at the expense of long delay in the final determination of this controversy to again appeal to this Court for a determination of the question, and we therefore feel justified in petitioning the Court to amplify its statements or views on this matter before the cause is remanded to the trial court for further proceedings. But in the event we have misconstrued the Court's opinion and the court in fact intended to hold as contended by appellees, then we would respectfully ask the Court to grant a rehearing on this point so that appellants may be permitted to further present their views and additional authorities on the question.

It is respectfully submitted that the contracts before the Court deal only with the *rate of flow* and with the *capacity* of the canals, reservoirs and ditches, and that the *nature of the water right acquired is determined by the statutes of the State*, which

provide that the settlers must acquire and receive a perpetual right, "*said perpetual rights to embrace a proportionate interest in the canal or other irrigation works, together with the rights and franchises attached thereto.*"

Section 1615, Idaho Rev. Codes.

We respectfully submit that neither the State contract nor the settlers' contract in any way modify, and in fact could not modify, and neither enlarge nor reduce the interest thus acquired, or the nature of the right. It was, however, entirely proper that the contracting parties should agree that the ditches to be constructed by the contractor should have a capacity sufficient to deliver the settler's water to which he was entitled under the statute "at the rate of 1-100 of a cubic foot per second per acre." This matter related solely to the construction features of the works and was an essential part of the construction contract, for it fixed the capacity of the canals without going into details as to dimension and grade. It seems to us that appellees erroneously construe the provisions of the contract, which deal only with the *rate of flow*, into a provision for the *sale of water*, and if, as stated above, the Court's opinion has been correctly construed by appellees, a rehearing should be granted these appellants for there would seem to be fundamental error in such a construction of the State laws and the contracts involved. And further, such a construction was not contended for by appellees, and being more favorable to them than the decision of the trial court the limit should in any event

have been placed at 2¾ acre feet per acre which was accepted as sufficient by appellees, and not 4.16 acre feet. For under this construction of the opinion it must follow that the error in the trial court's decision was simply in holding that the settlers were entitled to receive 2¾ acre feet per acre to be delivered at the rate of 1-100 of a cubic foot per second, *whether their crops needed the water or not;* whereas this Court, under appellees' construction of the opinion, gives the settlers 4.16 acre feet per acre at the rate of 1-100 of a cubic foot per second, *provided their crops require this amount*, and this would seem to express the difference between the two opinions on the nature of the water right; that is to say, under this construction, this Court has simply increased the amount (to be delivered to the settlers) from 2¾ acre feet per acre to 4.16 acre feet, although no appeal was taken by the settlers from the trial Court's decree. Clearly, the decision cannot be given a construction that will lead to such obviously incorrect results.

The laws of the State of Idaho as construed by its highest court conclusively determine the nature of the interest which a settler acquires in the irrigation system and water rights of a Carey Act project, namely, he must purchase a *perpetual water right* for each acre of land susceptible of reclamation from the system, "said *perpetual rights to embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto.*"

Sections 1615, 1626, and 1627, Idaho Revised Codes.

The "perpetual water right" and "water rights" referred to in the statute are not *independent* of the "proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto," but the water right referred to is embraced in and is a part of what is acquired by the settler by virtue of his ownership or purchase of such proportionate interest. In other words, the settler does not buy two independent rights and interests, but he buys a proportionate interest in the system which under the law gives him a perpetual water right or an undivided and proportionate interest in the water rights belonging to the system as well as in the canals and other structures.

These statutes and these questions have been so frequently before the Supreme Court of the State of Idaho that their meaning is no longer subject to controversy. In State vs. Twin Falls Canal Company, 21 Ida. 410, the court, after quoting Section 1615 of the Revised Codes relative to the interest which a purchaser shall acquire in the system, and after referring to the expression "said perpetual rights to embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto," said:

> "The term 'rights and franchises' as used in that section means *water rights* as well as other rights, including dams, canals, ditches, laterals, etc., and the interest which the purchaser of a *water right* has, not only in the irrigation works, but in the *water rights* as defined by that section

of the statute, is a proportionate interest. *Thus said statute contemplates that each owner of a water right has a proportionate interest in said entire irrigation works.*" (Our italics.)

After referring to the sections of the statute relating to the construction of Carey Act projects, the court says:

"Under the provisions of the statute, the completing of said works is supervised by the State and ultimately the works must be turned over to the settlers, thereby providing a kind of municipal ownership.

"Under the rules and regulations of the Land Board adopted October 16, 1909, the relation of the builder of the works to the project is set forth as follows: 'The company entering into this contract with the State is related to the undertaking simply as a construction company, whose duty it will be under the provisions of the State law and the terms of the contract to build a canal under the supervision of the State, the money spent in such construction being secured by the land which the canal is designed to irrigate."

Again the court says (p. 439, Idaho Report):

"Under the contract the interest of the settler is a proportionate interest in the entire canal system and water appropriation. . . . *The contract required the canal to have in all of its parts a capacity of* 1-80 *of a second foot per acre*,"

instead of 1-100 as in the case at bar.

And again, on page 444:

> "And further, under said contract, the settler owns a *proportionate share of said canal system and the water appropriated* for the irrigation of the land within said project."

This decision leaves no room for doubt that the water right sold the settler is a proportionate interest in the water rights of the Company and in the canals and irrigation works constructed under the State contract. This decision was reaffirmed in a case bearing the same title reported in 27 Idaho 728, and it has been repeatedly approved in other cases where the question has incidentally been before the court.

In Bennett v. Twin Falls North Side Land & Water Co., 27 Ida. 653, the relation of the construction company to the system and the water rights and the settlers was again before the court, and it was there said:

> "Said Land and Water Company is simply a Carey Act construction company, formed only for the purpose of acquiring a right to the use of water *which it temporarily holds, in a certain sense, as trustee for the prospective entryman* and which water right the entryman perfects by the application of the water to the reclamation of such lands. The Land and Water Company at no time has a perfected water right in the sense that it has applied the water to the reclamation of the land. In fact, it would be impossible for

it to perfect a water right, as it holds no land upon which the water could be used, and it only complies with the legal forms in the initiation of the water rights for and on behalf of the prospective settlers, while the settler, by an application of the water to a beneficial use, perfects the water rights and keeps and maintains the same alive, or prevents, by the use of the water, such right from lapsing.

"The Land and Water Company as a construction company *acquires, builds, or constructs nothing for itself*, but does so for the canal and operating company or settler, *and the entrymen own, operate and control the water rights and canal system* through the medium of the canal company, in which they all become share or stock holders by making the payments for their water rights." (Our italics.)

In Idaho Irrigation Co. v. Lincoln County, 28 Ida. 98, the question was again before the court in a case involving the question as to whether the interest of the construction company was subject to taxation under the laws of the State, and the court in that case discusses fully the nature of the rights acquired by the settler and the relation of the construction company to the system. It was there said:

"It is clear from the provisions of said Carey Act and the amendments thereto, and the statutes of the State applicable to said Act, that companies like the defendant are treated by the State

as, and are in effect nothing but construction companies engaged in constructing irrigation works under a contract with the State, and their remuneration is limited by the provisions of the Carey Act and the provisions of Section 1629, Revised Codes, to the actual cost of construction and the necessary expense of reclamation and reasonable interest thereon. . . .

"It is apparent that the law does not intend that benefit shall accrue to the construction company, and it is clear that the construction company is not the owner of the works constructed by it, nor of the water right connected therewith, for under the provisions of said Section 1629, the construction company is given a first and prior lien on the water right and land upon which said water is used for all deferred payments for such water right, *and under no reasonable construction of such law can it be held that the construction company is the owner of either the water right or the system, but is only given the right to sell them for the purpose of reimbursing it for the cost of construction.*

"The only means of remunerating the construction company is by the sale of the water rights. The State Land Board fixes the price per acre to be charged for such water rights by dividing the cost of reclaiming the land by the number of acres to be reclaimed and when all of the water rights connected with such system have been disposed of the construction company has, at least in

theory, been reimbursed by its outlay; provided that purchasers of such water rights pay the purchase price for them. The water rights unsold can not be considered in the ordinary sense as assets of the construction company, since water rights remaining unsold represent rather a liability of the construction company which can only be met by the sale of the water rights as provided by law.

". . . The construction company's interest *in the reservoir, dams, water rights, etc., is represented by the lien provided by law to cover the cost of construction.* Said Section 1629 authorizes the State to create a lien to cover the cost of construction with interest, and this lien represents the amount of money which the company has expended on which it has not received any return from those purchasing water rights.

"We refer to these matters for the purpose of showing the history and intent of the statutes above referred to." (Our italics.)

The last expression of the Idaho Supreme Court on the subject is in the recent case of State of Idaho and Robert Rayl vs. Twin Falls Salmon River Land & Water Company, decided December 27, 1916, not yet reported because a rehearing was asked on certain points; but on the subjects herein referred to the decision was seemingly accepted as correct by all parties. The rehearing was requested by the State because the court held that the State and its grantees were not entitled to purchase water rights

in the system. That decision is the most exhaustive discussion of the subject found in any of the reported cases. The court reviews the statutes, both State and Federal, and the history and intention thereof. The identical contracts now before this Court were before the court in that case. The court holds squarely that the construction company is not the owner of either the water rights or the irrigation works, but serves simply as a conduit for transferring the title from the State to the settlers. The court said:

> "The construction company was permitted, under the law, to appropriate the water, but only for the purpose of transferring it to the settlers for their use and benefit in connection with the irrigation system constructed by it. . . . A construction company desiring to build such works may make a proposal to do so for the irrigation of certain definite tracts of land, according to certain definite plans. (Sec. 1615, Rev. Codes.) This proposal really amounts to a bid for the doing of the work or the construction of the irrigation system. Section 1617, Revised Codes, provides that at the time of making such proposal, the construction company 'shall have filed with the State Engineer an application for a permit to appropriate water for the reclamation of the lands described' in the proposal. This seems to have been deemed a convenient way of attaching the water supply to such project.
>
> "The entire plan seems to be one of complete State supervision and control.

"The interest which the settler has in the enterprise is defined by Section ~~1510~~ 1645, Revised Codes, it being thereby required that the proposal shall state 'the price and terms per acre to which perpetual water rights will be sold to settlers on the land to be reclaimed, said perpetual rights to embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises (water rights) attached thereto.' This 'proportionate interest' was intended to be in the right represented by the water permit taken out for the project. It was intended that the settler should ultimately own the entire project—the works and the water rights.

". . . The company building the works is a construction company only. It constructs the works and payment to it must be made from the lien fixed by law, upon the land.

"As stated before the construction company was not the owner of the water. Under the law it was permitted to make an appropriation of the water for a specific purpose and before such appropriation was completed, it must construct works amply sufficient to carry such water for irrigation to the place of intended use as provided by the contract with the State." (Our italics.)

It would seem from these decisions that there is no authority for holding that the construction company guarantees a water supply or sells a specific amount of water; but the construction contract very properly and necessarily provides for the *size* of the

system to be constructed, and that is given in terms of carrying capacity, namely, it must be large enough to carry 1-100 of a cubic foot per second for each acre of land entitled to water therefrom, and that fixes *the rate of flow* or irrigation head which the settler is entitled to receive. Manifestly the contract would be incomplete if the dimensions or carrying capacity of the system were not set forth therein. But the rate of flow or irrigation head must not be confused with the *water right itself*, which is an independent matter and is determined by the statutes of the State and consists of a proportionate interest in the canals and other structures and all the rights and franchises attached thereto, which the Idaho Supreme Court says includes the water appropriation of the construction company made for that particular project.

We submit therefore that there is no basis for the contention that the company has sold the settlers a *water right* independent of the *proportionate interest* which the statutes provides the purchaser shall receive, or that the company has entered into an *unlimited* and *unconditional guarantee* whereby it guarantees delivery of a specific amount of water for all time.

II.

The Court should strike from the Opinion certain Statements prejudicial to appellants and not based upon facts in the record.

The opinion contains a number of statements which were apparently taken from the brief of ap-

pellees, which are wholly unsustained by the record, in fact some of them flatly contradicted by the record, and which are prejudicial to appellants and might in the future be construed as *res judicata*. Near the top of page 27 of the opinion the Court, after referring to the acreage which it was originally intended to reclaim from this system and from the water appropriated therefor, and to the errors made in the estimates, says:

> "How great all of them erred in their estimate is shown by the record in the case—*the capacity of the system being, as has been said, only about one-third of what it was then thought it would be.*" (Our italics.)

It would seem that the Court must have used the term *capacity* in the above statement as having reference solely to the amount of water available, and as not referring to the carrying capacity of the canals or the storage capacity of the reservoir; for clearly there is no contention that the system has not been well constructed and of the requisite size and dimensions to deliver water at the rate of flow stipulated in the contracts; and there is no question but that the reservoir has been built of the size and dimensions provided in the plans and specifications. In fact the canals have substantially double the capacity contemplated by the State contract. In other words, the canals have a carrying capacity sufficient to deliver water to the settlers at a rate considerably in excess of 1-100 of a cubic foot per second per acre (record, pp. 191-192, 234). But if we assume that

the word *capacity*, as used in the above statement, has reference to the amount of water available for distribution, the expression is still unfair to appellants, especially when read in connection with other statements in the opinion on the subject, particularly what is said on page 25, viz.:

> "And in view of the fact, *shown by the record and which is here undisputed, that the construction company has already sold water rights far beyond the available supply of water*, we are also of opinion that the court below was entirely right in enjoining it from making any further sales." (Our italics.)

This statement is especially prejudicial to appellants and unsupported by the record, for the trial court declined to try the issue as to the duty of water or the sufficiency of the available supply to serve the need of the settlers on the theory that the water contract required the company to deliver 2¾ acre feet per acre, regardless of whether the settler needed the water or not. In so holding the trial court was clearly wrong and it was so held by this Court in this opinion. Appellants produced a number of experts on the duty of water, thoroughly competent and qualified to testify intelligently on the subject, but the court declined to hear that evidence, all of which was error, as held by this Court in its opinion. But the above statements in the opinion, particularly "that the construction company has already sold water rights far beyond the available supply of water" will be especially prejudicial to appellants in all fu-

ture proceedings, not only in this case, but in adjustments before other tribunals especially when application is made for patent; for if the Secretary has any right to again pass upon the sufficiency of the water supply he will unquestionably give great weight to the opinion of this Court that water rights have been sold "far beyond the available supply of water."

And in view of the fact that appellants have contended in good faith that the water supply was sufficient to properly reclaim the lands entitled to water from the system, and the trial court has declined to hear evidence on the point, on the erroneous theory that it was not an issue, we respectfully submit that facts of this importance which have not been proven should not be assumed as established, particularly when they will have the prejudicial effect that it is apparent they will have in this case.

Appellants have expressed their entire willingness to discontinue the sale of water rights; in fact they voluntarily discontinued such sales several years ago, and they have no objection to the injunction continuing enjoining them from selling additional rights, if such restraint should be deemed necessary. But the injunction should not rest upon the ground that they have oversold the available supply, for that fact has not been established. It should be sufficient that appellants admit that they have sold to the limit of the available supply, and that they do not desire to make further sales. We submit, therefore, that the statements referred to should be stricken from

the opinion, or else they should be qualified in a supplemental opinion so that they will not operate to appellants' prejudice in future proceedings.

III.

Does the Federal Law contemplate that the Secretary of the Interior shall determine the sufficiency of the Water Supply before the segregation is made and before the works are constructed, or should such decision be deferred until after the works have been built and the lands have been settled upon and improved by actual settlers?

The Court in its opinion says:

> "It is obvious that whether or not such a supply (sufficient to justify the issuance of patent under the Carey Act) is actually furnished is a pure question of fact; and that all questions of fact in relation to all public lands are matters for the exclusive determination of the officers of the Land Department has been so many times decided by the Supreme and other Federal courts as to render the citation of cases unnecessary. To what extent the Secretary of the Interior will, in determining the facts, take into consideration the approval of the plan by himself as well as by the State officials, and his order segregating the tract applied for from the public domain will be for him to consider and determine."

The legal propositions referred to in the above quotation were not discussed at the oral argument and, we believe, were not referred to in the briefs

filed at the time or before the hearing, and in any event were not referred to in the decision of the court below. And apparently the reversal of the trial court rests in no way on what this Court said on this subject.

What this Court, however, said in the above quotation and in what immediately preceded it about this matter will undoubtedly influence the trial court in the relief that may be granted. The question is of vast importance to the parties in the practical solution of the controversy, but the statements of this Court with reference to the matter show clearly that the Court seemingly missed the point which appellants have made with reference to the binding effect of the Secretary's decision, and we think the Court erroneously assumed that it was *a question of fact* when we believe it is largely, if not entirely, *a question of law.*

In the first place, appellants have never contended that the Secretary did not have the right to pass upon the sufficiency of the water supply. On the contrary, appellants contend, and always have contended, that it was the duty of the Secretary to determine the matter, and that the Secretary had as much right to determine that question as he has to determine the classification of lands as mineral and non-mineral or as desert and non-desert; but appellants submit that the law contemplates that when the Secretary has *once* determined the question and rights have vested in reliance upon that determination he cannot change his views, ignore his former

decision, and decide that the water supply is insufficient when he had formerly declared it to be sufficient. We believe the law clearly contemplated that the sufficiency of the water supply should be determined *before* and not after the construction of the works is undertaken, *before* and not after the land is segregated, *before* and not after the State is permitted to contract with settlers to deliver the title, and *before* settlers are permitted to go upon the lands, establish homes there and make substantial and valuable improvements.

It is inconceivable that Congress intended that all of these things should be done and then, as the last and final step in the obtaining of title, the Secretary should determine whether there was sufficient water available in the source of supply for the reclamation of the lands to justify the issuance of patents, the giving of title to the settlers or the attaching of the lien for the security of capital building the works.

The determination of the sufficiency of the water supply to accomplish the reclamation required by the Federal Act is not entirely a question of fact. It necessarily involves a construction of the law as to the extent of the reclamation required. The assembling of the data and facts as to the water supply is, of course, a matter which involves only facts, but the extent of reclamation required by the Federal Act before the Secretary is justified in issuing patent is clearly a question of law. It raises questions which from no viewpoint can be said to be questions of fact. For instance, (1) Does the Federal Act re-

quire that the entryman shall have sufficient water to produce a maximum yield of a crop requiring a very large amount of water, such as alfalfa? Or, (2) Is the law satisfied if the entryman has sufficient water to raise a profitable grain crop requiring but a small amount of water, such as oats, barley, or wheat? Or, (3) Does the law require that the entryman shall have sufficient water to produce a maximum yield of any kind of grass or grain crop that it may be possible to grow in that section? Or, (4) Is it satisfied with sufficient water to raise a profitable crop under good farming conditions, though less than maximum yield? Or, (5) To what extent does the law consider the economic duty of water?

We think the above propositions are questions of law upon which the Secretary must undoubtedly pass, either when the segregation is made or when application is made for patent; and there is a very wide difference between the acreage that may be reclaimed from the available supply under the several constructions that may be placed upon the law. If the law be satisfied with a grain crop, such as oats, barley or wheat, 1¼ acre feet of water per acre would undoubtedly be sufficient. On the other hand if the law contemplates that the entryman shall have sufficient water to produce a maximum yield of a crop requiring a large amount of water, such as alfalfa, then 3 or 4 acre feet would probably be required, and the area reclaimable would be only about one-third what it would be under the other possible construction.

We submit that the case cannot be disposed of upon the general proposition that it is simply a question of fact, the exclusive determination of which has been vested in the Land Department. *But we are not questioning the right of the Secretary of the Interior to pass upon the matter.* We are simply insisting that having passed upon the matter when the segregation is made, *he cannot change his determination after the State has contracted with the settlers to deliver title, and after the construction company has constructed the work in reliance upon the lien authorized by the Federal Act, and after the settlers have made improvements and established homes on the land.*

The Federal Act was the forerunner of the National Reclamation Act under which the works are constructed by the Federal Government. The original Carey Act contemplaed that the works would be built by the State. This was found impracticable, and hence the amendment of June 11, 1896, which authorized the State to create a lien against the lands segregated in favor of the construction company. It is clear from the discussion in the House that the amendment was proposed for the purpose of furnishing adequate security to induce private capital to undertake the construction of irrigation works. The time had not then arrived for the Federal Reclamation Act, and the purpose of the amendment was to induce private capital to do what individual effort could not accomplish under the Desert Land Law and what the States could not do under the original

Carey Act. That *security* for the large amount of capital required for the building of irrigation works was the essential object of the Act, as amended, was clearly apparent.

Congressman Mondell, of Wyoming, in discussing the amendment of 1896, said (Congressional Record, June 6, 1896, p. 6224):

> "There remain vast tracts of bench lands back some distance from the largest streams, requiring the expenditure of vast amounts of capital for their irrigation. It is absolutely necessary that, in inviting capital to the irrigation of vast tracts, we shall make such provision as shall absolutely insure to capital a fair return of the investment made. We simply provide in this amendment that the State shall pass such laws as will adequately protect both the capitalist and the small holder of land * * *.
>
> "It is but reasonable when capitalists undertake to irrigate vast areas of desert land, which, without irrigation, will absolutely not sustain animal or vegetable life, that they should expect to be reasonably protected in the investment they make. It is only by providing for this protection that we can ever hope to have our country developed * * *."

The amendment of June 11th makes two important changes in the original Act. First, it authorizes the State to create a lien against the public lands "for the actual cost of necessary expenses of reclamation and reasonable interest thereon." Second, it

provides that patent shall issue without regard to settlement or cultivation, "when an ample supply of water is actually furnished in a substantial ditch or canal or by artesian wells or reservoirs."

Under the law the segregation cannot be made until the Secretary has determined that there is *sufficient water available to reclaim the acreage segregated*, and that the plan submitted for the reclamation of such land is feasible. These questions must be determined by the Secretary before he is authorized by the law to segregate the lands from the Public Domain and tie them up in a contract with the State for a period of ten years.

It is true that the contract of segregation contains reservations inserted by the Secretary, for which there would seem to be no authority in the Act, and under these reservations the Secretary attempts to reserve authority in himself to do when application for patent is made, what the law requires him to do before the lands are segregated from the Public Domain, viz., determine the sufficiency of the water supply to properly reclaim said lands. If the reservations of the contract of segregation are valid and authorized by the Act, then it would seem the contract is without force or effect, for the obligations assumed by the Government in one part of the contract are all apparently subject to the future decision of a future Secretary on the sufficiency of the water supply.

The contract would seem to fall under the rule where the exceptions are as broad as the grant, and

the purported contract is in fact not a contract, for the agreement to patent the lands is conditioned as to every essential point on the views of the Secretary that may be in office when patent is demanded. Manifestly if the reservations are valid, the act of segregation does not furnish the slightest security for the capital invested, the settlers, or the State. For if the Secretary has the absolute power to decline to issue patent, notwithstanding the irrigation system has been constructed in full compliance with the plans which he approved when the segregation was made, then there can be no lien for the investor, no title for the settler, and the State has only brought upon itself entanglements from which it cannot escape, for it has allowed entries to be made upon the segregated lands and it has accepted the final proof of the settlers and obligated itself to furnish the settlers title, and this it cannot do because the Secretary has changed his views as to the feasibility of the project, or, possibly, because the new Secretary does not concur in the views of his predecessor.

We submit that such a situation was never contemplated by Congress, for the sanity of such legislation may well be questioned. The whole spirit and purpose of the Act was *security and assurance* rather than *confusion and uncertainty.* The law cannot accomplish its true purpose unless it be construed to mean that the Secretary must determine, as must the capitalist, the settler, and the State, the feasibility of the plan *before* it is undertaken and not *after* it has been completed. Under our construction of

the law, the Secretary must, *before* he approves the application for segregation and *before* he approves the maps and plans of irrigation and enters into the contract with the State, determine the following questions:

(a) Is the project feasible?

(b) Are the lands the kind of lands that may be segregated under the Carey Act?

(c) Is the water supply sufficient?

Clearly the feasibility of the project depends on whether there is water available for irrigation, and the lands cannot be legally segregated until he has determined that question. The law contemplates that the Secretary's decision on those points shall be final and conclusive, and there remains then but one question to be determined when application is made for patent, and that is, whether the works have been constructed in substantial accordance with the plans previously approved? That matter from the necessities of the situation cannot be determined when the segregation is made, but the other questions can as well be determined when application is made for segregation as when application is made for patent. It certainly is no more difficult for the Secretary of the Interior to determine the sufficiency of the water supply than it is for the State, the investor, or the settler, and the entire framework of Carey Act reclamation rests upon the integrity of the Federal lien, which loses all its value under a construction that reserves to the Secretary the right to ignore the determination which he made when the segregation

was made and to pass upon the question as to whether the water supply is sufficient for patent after the works have been built and the investment has been made.

Manifestly if the Secretary may reserve his decision on the feasibility of the project until after it has been completed, both the investor, the settler and the State must proceed in the absence of any certainty or security, for in that event the investment must be made first and the matter of security for the investment is the last thing to be ascertained. Clearly Congress could not have intended a procedure so obviously inconsistent with ordinary business prudence and with the recognized procedure in irrigation development.

The original Act provided for a tentative reservation of the land while the Secretary was determining the feasibility of the project and the sufficiency of the water supply, and the fact that provision was made for such temporary segregation shows clearly an intention to make the final approval of the plan of irrigation submitted by the State something more than a mere tentative or temporary act, and the amendment of 1896 shows clearly that Congress intended that the State could place some confidence in the act of segregation or the approval of the plan by the Secretary of the Interior, for it is provided:

> "That any state contracting under this section *is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation . . .*"

It is incredible that Congress could have intended that the State should enter into such contracts and obligate itself to deliver title and to create liens and furnish security for the investor upon a mere tentative and inconclusive decision of the Secretary that he would patent the lands to the State, with the reservation and right remaining in the Secretary to change his mind for any cause by him deemed sufficient. If that is the proper construction of the Act, then the only security which the law furnishes to either the State, the investor, or the settler, is the stability of the Secretary's judgment on the sufficiency of the water supply. If he changes his mind the security is gone and the State can not obtain patent or the settler title, and the investor obtains no lien or security for his investment.

We submit that such a construction is so inherently unsound that it should not be adopted unless the language employed forbids any other construction.

The Secretary, however, has always proceeded upon the theory that the segregation could not be made unless the plan was feasible and the water supply sufficient. In the first regulations under the Carey Act, approved by the Secretary November 22, 1894, the Secretary provides that:

> "In accordance with the requirements of the Act, the State must give full data to show that the proposed plan will be sufficient to thoroughly irrigate and reclaim the land and prepare it to raise ordinary agricultural crops; for which purpose a statement of the amount of water available for the plan of irrigation will be necessary.

> The other data required cannot be fully prescribed, as it will depend upon the nature of the plan submitted. All information necessary to enable this office to judge of its practicability for irrigating all the lands selected must be submitted." (20 L. D. 440.)

The regulations show clearly that the Secretary did not intend to make the segregation and that the law did not, in his opinion, authorize the segregation until he had approved the sufficiency of the plan of irrigation and the sufficiency of the water supply.

In the later regulations (37 L. D. 629), the Secretary requires that in order to enable him to pass upon the sufficiency of the proposed plan, the State must furnish "a statement by the State Engineer of the amount of water available for the plan of irrigation," and it is a well-known fact that the Department of the Interior, through its own special agents, investigates and reports on the character of the land and the feasibility of the plan of irrigation before any segregation is made. (See Instructions to Inspectors and Special Agents, dated March 9, 1909, 37 L. D. 489.) In those instructions the Commissioner and the Secretary join in the statement that "*The time to ascertain whether the lands are of the character subject to segregation under the Carey Act, and whether there is water available for their reclamation, is prior to segregation.*"

In view of the provisions of the Act requiring a decision on the feasibility of the project before the segregation is made and in view of the information

furnished the Secretary and what is gathered by him through his own agents on these matters, what reason or authority is there for reserving a decision on all questions until application is made for patent? When the segregation is made, the State is by the Federal Act authorized to contract for the construction of the works and for their settlement and improvement; and when the State has performed its part of the contract, it is entitled to performance by the Government, for the construction of the works previously approved by the Secretary clearly earns the right to the lands segregated. In that respect the construction of the irrigation works is substantially parallel with the construction of a railroad under the railroad land grants. Referring to such grants, the Supreme Court of the United States, in Burke vs. Southern Pacific R. R. Co., 234 U. S. 669, 680, said:

> "And when by constructing the road and putting it in operation, the company performed its part of the contract it became entitled to performance by the Government. In other words, it earned the right to the lands described."

That the officers of the Land Department have no authority to defer their decision beyond the point in time contemplated by the law under which they are acting, or to make reservations to that effect in contracts or patents, has been repeatedly held by the Supreme Court of the United States in connection with the classification and patenting of lands under the railroad land grant acts. In those cases, the

Government usually granted a certain number of sections of land on either side of the road, "excepting mineral lands." Under those acts, the matter did not come before the Land Department for a decision until the road had been constructed and application was made for patent, but provision was made for the selection of lieu lands whenever a part of the grant was lost to the railroad company because of the mineral character of the land. In those cases the Land Department, although it made an investigation before patent was issued, adopted a rule, as a matter of precaution, of issuing patent to certain described lands, with the reservation, "excluding and excepting all mineral lands should any such be found in the tracts aforesaid." These reservations have uniformly been condemned by the Courts and the exception held void and unauthorized.

The Supreme Court of the United States, in Burke vs. Southern Pac. R. R. Co., supra (234 U. S. 669, 58 L. Ed. 1527, 1552), quoted with approval from the opinion of Circuit Judge Sawyer in Cowell vs. Lammers, 21 Fed. 200, as follows:

> "There is no authority to issue a patent which, in effect, only says if the lands herein described hereafter turn out to be agricultural lands, then I grant them, but if they turn out to be mineral lands, then I do not grant them. Such a patent would be so uncertain that it would be impossible to determine, from the face of the patent, whether anything is granted or not."

If such language is too general for a patent, is it not equally fatal in a contract for a patent?

In the Burke case the Court, quoting from the decision in Deffeback vs. Hawke, 115 U. S. 392, 29 L. Ed. 424, further says:

> "The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with the recitals showing a compliance with the law and the conditions which it prescribed."

And quoting from the decision in Davis vs. Wiebold, 139 U. S. 507, 35 L. Ed. 238, the Court said:

> "But we do not attach any importance to the exception (referring to the exception of mineral lands in a townsite patent), for the officers of the land department, being merely agents of the Government, have no authority to insert in a patent any other terms than those of conveyance, with the recitals showing compliance with the conditions which the law prescribes. Could they insert clauses in patents at their own discretion they could limit or enlarge their effect without warrant of law."

And referring to the contention that the patents may have been issued without proper investigation by the Land Department as to the mineral character of the land, the Court quoted with approval from Barden vs. N. P. R. R. Co., 154 U. S. ~~228~~ 288, 38 L. Ed. 992, as follows:

> "It is true that the patent has been issued in many instances without the investigation and

consideration which the public interest requires; but if that has been done without fraud, though inadvisably by officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequences must be borne by the government until, by further legislation, a stricter regard to their duties in that respect can be enforced upon them."

In the Burke case the Court also quoted with approval from Shaw vs. Kellogg, 170 U. S. 312, 42 L. Ed. 1050. In that case no patent had issued, but to avoid title passing, through the issuance of patent, to the mineral lands in a Mexican land grant, the Commissioner prevailed upon the surveyor General to conditionally approve the field notes and survey of the grant under consideration by placing in the certificate of approval of the survey, instead of in the patent, the mineral exception contained in the Act. The Court said:

"What is the significance of, and what effect can be given to, the clause inserted in the certificate of approval of the plat, that it was subject to the conditions and provisions of the Act of Congress? We are of the opinion that the insertion of any such stipulation and limitation was beyond the power of the land department. *Its duty was to decide, and not to decline to decide; to execute, and not to refuse to execute, the will of Congress.* It could not deal with the land as an owner and prescribe the conditions upon which title might be transferred. *It is an agent,*

and not principal. . . . Undoubtedly it could refuse to approve the location on the ground that the land was mineral. *It was its duty to decide the question—a duty which it could not avoid or evade.* It could not say to the locator that it approved the location provided no mineral should ever hereafter be discovered, and disapproved it if mineral were discovered; in other words, that the locator must take the chances of future discovery of mineral. It was a question for its action, and its action at the time. . . . It cannot in that way avoid the responsibility of deciding and giving to the party seeking to make the entry a full title to the land, or else denying it altogether." (Our italics.)

The Court, referring to the question before it in the Burke case, said:

"Lastly, it is urged that the railroad company accepted the patent with the mineral exception therein, and also expressly agreed that the latter should be effective as one of the terms of the patent, and so is bound by it, or at least estopped to deny its validity. There are insuperable objections to this contention. The terms of the patent whereby the Government transfers its title to public land are not open to negotiation or agreement. The patentee has no voice in the matter. It in nowise depends upon his consent or will. He must abide the action of those whose duty and responsibility are fixed by law. Neither can the land officers enter into any agreement

upon the subject. They are not principals, but agents of the law, and must heed only its will." (Citing cases.)

The Supreme Court of Oregon in State vs. Des Chutes Land Co., 129 Pac. 764, had before it provisions of the contract between the State of Oregon and a Carey Act company wherein the company had agreed with the State that no settlers' contracts would be entered into until after the works had been constructed and notice had been given by the State that water was available. In that case the company disregarded such provision of the State contract and entered into contracts in direct violation of the terms of the State contract, and the State sought to enjoin the Company from entering into settlers' contracts in advance of the time fixed by the State contract. The Court said:

"The question is whether the State Land Board had authority to insert the provision quoted in the contract with the defendant. By its legislation the State created the State Land Board as its agent to transact the business provided for in the act. There is no apparent authority, so-called, in a public officer whose duties are prescribed by statute like there would be in the case of an agent for a private party. The representative of the State must have actual authority in such cases. The agent of the State, acting under a public law, must find sanction for his doings in the statute itself; and parties dealing with such agent are bound, at their peril, to take no-

tice of the enactment conferring the agent's authority. A contract made by a public officer in excess of the provisions of the statute authorizing such contract is void, so far as it departs from or exceeds the terms of the law under which it was attempted to be negotiated. . . . Being a departure from the Board's authority, and thus contrary to the statute, the provision is void and does not bind either party to the instrument, because the contract, to be efficacious, must be equally binding upon both parties. The defendant had a right to contract to do in the future that which might legally be done under the provisions of that section (referring to the statute). While it would be within the scope of legislative authority to prevent actual settlers from going upon the land and stipulating with the corporation for the extinguishment of its lien, so that the settler could proceed unhampered in the establishment of his home, yet this species of paternalism was not vested in the State Land Board."

That the approval of the plan of irrigation by the Secretary of the Interior was binding upon him when it came to the issuance of patent, was clearly the basis of the decision of the Secretary in the case of State of Oregon, 36 L. D. 509. In that case the Inspector of the Department reported long after the segregation had been made that the plan of irrigation was not feasible and that certain other matters should be considered by the Secretary in connection

with that segregation or the revocation thereof. The Secretary there said:

> "As to the sufficiency of the scheme of irrigation of the desert portion of the land heretofore segregated, the Department has once passed upon that feature of the case and gave its sanction to the proposed plan. It may or may not be feasible in the light of existing conditions. Inspector Neuhausen thinks not, although Engineer Whistler thinks that a proposed storage reservoir will aid—a reservoir feasible but very expensive. However, that is a matter of interest to the State. The government has already passed upon its scheme; it remains for the State within the time fixed by the statutes, to carry its scheme into effective operation. If it does not, then will be the time for the Federal Government to act. The Department feels that the State should not now be harassed by bringing into controversy the practicability of its scheme."

In justice to the Secretary, the foregoing must be construed to mean that if the State constructed the works in accordance with the plan approved when the segregation was made, patent would issue as a matter of course, without regard to the uncertainty thrown upon the sufficiency of such plan by the report of the Inspector. Any other construction would imply an unfair and unworthy motive on the part of the Secretary, and such construction would be unjustifiable under the circumstances.

We submit, therefore, that a fair analysis of the Act, in the light of the purposes which it was intended to accomplish, leads inevitably to the conclusion that patent must issue from the Federal Government to the State of Idaho in trust for the settlers and the construction company, to the lands that lie under and are susceptible of reclamation from the works constructed by the Twin Falls Salmon River Land and Water Company, upon proof that such works have been constructed in substantial compliance with the plans approved by the Secretary when the segregation was made.

Again we say that we do not challenge the right of the Secretary to pass upon the sufficiency of the water supply to reclaim the land segregated, but, on the contrary, we submit that it was his duty to determine the matter and, further, the rule is well established that, where a particular authority is confided to a public officer to be exercised by him in his discretion, upon an examination of facts of which he is made the appropriate judge, his decision upon these facts is, in the absence of any controlling provisions, absolutely conclusive as to the existence of those facts.

> United States vs. California and Oregon Land Company, 148 U. S. 31, 43, 37 L. Ed. 354, 360.

But we insist that the time for determining the sufficiency of the water supply and the feasibility of the project was *before* the segregation was made and that the Secretary can not change his decision with

reference to that matter *after the works have been built and rights acquired in reliance upon his former decision.* This same rule has been applied by the Supreme Court of Idaho to the decisions of the State Board of Land Commissioners and the State Engineer in these matters.

We have already quoted at some length from the recent decision of the Idaho Supreme Court in State of Idaho and Robert Rayl vs. Twin Falls Salmon River Land and Water Company. The court said in that case with reference to this matter:

> "The State acts in the matter of making the contract and in the approval of the form of settlers' contracts, as well as in other matters, as agent and trustee for the settlers who in the futhure are to inhabit the land in the project.
>
> "Thus it will be seen, that before making any contract, the plan for the irrigation works or system must be approved by both the State and the National authorities and the sufficiency of the water supply determined by each. Clearly, the future plan is one providing that the cost of the reclamation of such lands shall be assessed as a benefit against the land to be paid by the settler and that the benefit is assessed through the medium of the State Board of Land Commissioners.
>
> "Of course, the engineers of the construction company examined the resources of water supply and no doubt, satisfied themselves that there would be sufficient water to reclaim the land ask-

ed to be segregated; but the determination of the question of the water supply was up to the State and the Secretary of the Interior. In the first instance, if upon such an application the Secretary of the Interior concludes that the water supply is not sufficient, he refuses the application for segregation; and if the State concludes that the water supply is not sufficient, the application is denied. But if the State has decided that question in favor of an ample supply of water, and the Secretary of the Interior has also decided that an ample supply of water exists, that question is settled, so far as the Government and the State are concerned.

"That question was evidently understood to have been fully settled by proper authority before the construction company would undertake the expenditure of from two to three million dollars in constructing an irrigation system. Is it possible that any good business man or corporation would consent to the expenditure of from two to three million dollars in the construction of an irrigation system, leaving the question open for the State and Government to decide thereafter whether there was a sufficient water supply for the project? It seems to us not. . . .

"It is clear, under the provisions of the Carey Act and the State law applicable thereto, that the proper officers there referred to must determine in advance the sufficiency of the water supply, the character and kind of system of irrigation that must be constructed and the price

to be charged the settlers for an interest therein. This matter is not left to the judgment of the construction company. The whole matter must be first approved by the State and then by the Federal Government. These things are all done before the execution of the contract between the State and the construction company. . . . We think the law is well settled that where officers, such as the State Engineer, the State Land Board, and the Secretary of the Interior are authorized by law to pass upon matters of this character, their decision is conclusive."

Clearly no one should be made to suffer because he has in good faith placed confidence in the official acts of public officials, and in view of the importance of this question we respectfully submit that a rehearing be granted so that it may be fully discussed.

IV.

If the Secretary of the Interior is not bound by his first decision as to the sufficiency of the water supply and feasibility of the Project, but may finally determine the duty of water on the Project when application is made for patent, then it must necessarily follow that all water contracts entered into after the limit fixed by the Secretary was reached are absolutely void, and the available supply must be distributed between those who purchased before such limit was reached.

While we are firmly of the opinion that patent should in this case issue to all the settlers and that

the Secretary should not be permitted to repudiate his approval of the water supply and his decision that it was sufficient, made when the segregation was applied for, nevertheless, if the Court holds to the contrary, we submit that it must necessarily follow that the doctrine contended for by Judge Albert N. Edwards of St. Louis, who filed a brief in the case as *amicus curiae*, should be adopted, viz.:

That undivided and proportionate interests in the irrigation system and water rights may be sold to the limit of the available supply, or to a point where such undivided interest will entitle the owner to a water supply sufficient to obtain title to his land under the Federal Act. But beyond that point sales cannot be made, and that all contracts entered into after that point has been reached are absolutely null and void, unauthorized alike by the State and Federal laws. Any other construction would lead to the disastrous situation that a settler who had purchased water rights before the limit was reached, would without his knowledge, acquiescence, or consent, be deprived of his property,—of all possibility of obtaining title to his land,—by the company selling water rights in excess of the limit or to an extent that would leave each settler less water than the Secretary of the Interior may require as a condition precedent to the issuance of patent. Each purchaser, before the available supply has been exhausted, must be held to have purchased and acquired a supply sufficient to entitle him to patent. Less than that would defeat his title to the land, and neither

the State nor the parties to the contract can be held to have intended such a result, or a plan or procedure that would give no title to the settlers and no lien to the construction company, but would result in a total destruction of the investments of all parties and a forfeiture of the lands to the Federal Government, notwithstanding the works and the water rights would be ample to irrigate a very large part of the entire segregation, or all the lands entitled to water under contracts entered into upon the faith that the Secretary would adhere to his first decision.

This doctrine concedes the correctness of the doctrine of dedication and the sale of undivided and proportionate interests and the rule of equality between water users and rejects all priorities as between the settlers who have binding contracts; but it limits all contracts to the available supply as determined by the Secretary of the Interior. It imposes as a fundamental and supreme limitation on the State laws and all contracts made thereunder that water rights on Carey Act projects cannot be sold beyond the acreage for which patent may be obtained, and that all contracts entered into after such limit has been reached are null and void, and cannot operate to defeat the title of those who purchased before such limit was reached, nor deny them the opportunity to obtain patent to the lands which they entered.

This question was not discussed at the hearing or in the oral argument, and if this Court rejects the proposition that the Secretary must issue patent if

the works have been constructed in accordance with the plans which he approved when the segregation was made, then we respectfully submit that appellants should be permitted to be heard upon the proposition stated above.

It must be apparent that a tremendous loss will result to all parties and the conditions under the project be greatly unsettled unless a principle or doctrine is established by the Court by which it may be determined to whom patent shall issue, in the event the Court holds that the Secretary is not required to issue patent to all the lands in the segregation that have become entitled to water from the system in reliance upon his decision at the time the segregation was made. No individual or board should be held to have the arbitrary and autocratic power to say who are entitled to water and who may receive title from the Government in the event the settlers are not all entitled to patent; and we submit that if the Court departs from the doctrine that the Secretary is bound by his former decision, then the only feasible and practical solution of the unfortunate situation confronting the project must be that there is no priority between the purchasers who acquired water rights for the acreage that the Secretary is willing to patent under this project, but all contracts entered into after such acreage had contracted for water are without force or effect. In other words, the doctrine of no priority between water users announced by this Court in its decision would be applicable only to the acreage that may be

reclaimed from the available supply under a duty of water to be fixed by the Secretary of the Interior, and under that rule the rights of all parties must remain in suspense and cannot be adjudicated or determined by the Courts, or by any other authority, until the Secretary has determined the acreage that he is willing to patent, and the persons entitled to patent be ascertained by taking the contracts in the order in which they were entered into until the aggregate thereof reaches the acreage which the Secretary has signified his willingness to patent.

This is but an extension of a doctrine that has frequently been applied to private irrigation projects in the West where water rights have been sold in excess of the carrying capacity. In this case the rule of priority would be applied only as between those who purchased before the available supply had been exhausted and those who purchased after that point had been reached. Under this rule the Secretary of the Interior would determine the extent of the proportionate interest each settler acquires, and the limit of the proportionate interest that may be sold in the system will be the acreage which the Secretary is willing to patent.

V.

Costs.

This Court ordered that each party should pay its own costs on appeal. We respectfully submit that that is unfair to appellants. They were clearly justified in taking the appeal and could not in fact do otherwise, and no unnecessary costs were incurred

by them on appeal; and there would seem to be absolutely no reason for departing from the almost universal rule of permitting a successful appellant to recover his costs. The opinion does not show any mitigating circumstance that would justify a departure from the rule, neither does it set forth any reason for imposing this penalty on appellants, and it is respectfully submitted that the errors committed by the trial court were committed in an attempt to comply with the views of appellees. Hence whatever error there is in the record justifying a reversal the responsibility therefor should be laid to appellees, and there is no reason for relieving them from the payment of costs.

Respectfully submitted,
S. H. HAYS,
RICHARDS & HAGA,
Solicitors for Petitioners.

State of Idaho,
County of Ada,—ss.

I, OLIVER O. HAGA, of counsel for petitioners above named, do hereby certify that in my judgment the foregoing Petition is well founded, and that it is not interposed for delay.

Dated June 8, 1917.

OLIVER O. HAGA,
Solicitor and of Counsel for Petitioners.